

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

TUMELSON FAMILY LIMITED  
PARTNERSHIP, et al.,

Plaintiffs,

v.

WORLD FINANCIAL NEWS  
NETWORK, et al.,

Defendants.

CASE NO. C03-1340JLR

ORDER

**I. INTRODUCTION**

This matter comes before the court on Plaintiffs' second supplemental motion for attorneys' fees and costs (Dkt. # 307). The court has considered the parties' briefing and supporting declarations. The court GRANTS Plaintiffs' motion but reduces the amounts awarded for attorneys' fees and costs for the reasons stated below.

**II. BACKGROUND**

In April 2005, a jury returned a verdict against all of the Defendants on virtually every claim the Plaintiffs (collectively the "Tumelsons") made against them. After the court entered judgment and resolved Defendants' post-trial motions, the court considered the Tumelsons' initial motion for attorneys' fees. In its order on that motion (Dkt. # 304), the court determined that the Tumelsons were prevailing parties entitled to attorneys' fees and costs, that Defendants would share liability jointly and severally for their attorneys'

1 fees under the Securities Act of Washington (“WSSA”), and that the fees the Tumelsons’  
2 expended in pursuing their WSSA claims were largely inseparable from the fees  
3 expended in pursuing their other claims. For several reasons, the court declined to enter  
4 an award of fees and costs. The Tumelsons now move for their award.

### 5 **III. ANALYSIS**

6 At the outset, the court notes that it will not consider the opposition of Defendants  
7 World Financial News Network, Inc. (“WFNN”), Joseph de Beauchamp, and Deborah de  
8 Beauchamp to the Tumelsons’ motion. When the Tumelsons initially moved for  
9 attorneys’ fees, no Defendant except Ronald Slaughter opposed the motion. Now, WFNN  
10 and the de Beauchamps have filed an opposition to the instant motion. The court holds  
11 that these Defendants waived their right to object to the Tumelsons’ fee request by failing  
12 to respond to the initial motion. The court will not consider their belated opposition.<sup>1</sup>

13  
14 In addition, the court will not address Defendant Slaughter’s objection to imposing  
15 joint and several liability for attorneys’ fees, nor his insistence that much of counsel’s  
16 time was spent pursuing claims that are severable from the WSSA claims. The court  
17 addressed these objections in its initial order on attorneys’ fees, and will not repeat its  
18 analysis here.

#### 19 **A. The Court Awards the Tumelsons Costs of \$6,288.37.**

20 The court applies Washington law to the Tumelsons’ request for costs. Generally,  
21 federal law governing costs applies in actions decided in federal court. Courts have made  
22 an exception, however, when state law supplies the basis of a federal court’s decision and  
23 the state law makes costs a substantive element of damages. See Clausen v. M/V New  
24 Carissa, 339 F.3d 1049, 1064-65 (9th Cir. 2003). In Clausen, the court considered the

---

26  
27 <sup>1</sup>Even if the court were to consider the opposition of WFNN and the de Beauchamps, it  
28 would have no effect on its disposition of the instant motion. These Defendants’ opposition  
consists of nothing more than a statement that they join in Defendant Slaughter’s arguments.

1 Oregon Oil Spill Act, which provides strict liability for “damages” that an oil spill causes.  
 2 Id. at 1061 (quoting Or. Rev. Stat. § 468B.310(1)). The statute defines damages as  
 3 “damages, costs, losses, penalties, or attorney fees of any kind for which liability may  
 4 exist under the laws of this state . . . .” Id. (quoting Or. Rev. Stat. § 468B.300(6)). The  
 5 court held that by including costs as an express element of recovery under the Oil Spill  
 6 Act, Oregon made costs a component of substantive law rather than procedural law. Id.  
 7 at 1065. The Clausen court thus held that Oregon law, not federal law, governed the  
 8 plaintiffs’ cost request.<sup>2</sup> Id. at 1066.

9 Under WSSA, a plaintiff who sues the seller of a security and prevails is entitled  
 10 to the following relief:

11 the consideration paid for the security, together with interest at eight  
 12 percent per annum from the date of payment, costs, and reasonable  
 13 attorneys’ fees, less the amount of any income received on the security,  
 14 upon the tender of the security, or for damages if he or she no longer owns  
 15 the security. Damages are the amount that would be recoverable upon a  
 tender less (a) the value of the security when the buyer disposed of it and  
 (b) interest at eight percent per annum from the date of disposition.

16 RCW § 21.20.430(1). Like the Oregon statute in Clausen, WSSA provides that costs are  
 17 an element of the plaintiffs’ recovery, thus elevating costs from a procedural right to a  
 18 substantive one.

19 The Tumelsons attempt to distinguish Clausen by arguing that RCW § 21.20.430  
 20 makes “damages” available only to plaintiffs who do not retain their securities. Because  
 21 they retained their securities, the Tumelsons argue that while they are entitled to recovery  
 22 under WSSA, that recovery is not “damages.” This argument elevates semantics over  
 23 substance. Clausen is not so narrow that it applies only to state statutes that use the term  
 24

---

25 <sup>2</sup>Although no party raised the issue, the Clausen court was exercising diversity  
 26 jurisdiction, whereas this court heard this dispute under its federal question jurisdiction and  
 27 exercised supplemental jurisdiction over the state law claims. The court finds, however, that the  
 28 critical factor in Clausen was that state law supplied the rule of decision, not the existence of  
 diversity jurisdiction. 339 F.3d at 1065.

1 “damages.” Instead, it applies to any state statute that gives a plaintiff the substantive  
2 right to recover costs. WSSA is one such statute. The Tumelsons must rely on state law  
3 to recover costs for their WSSA claims.<sup>3</sup>

4 The Tumelsons seek \$6,629.37 in costs under state law. The court finds their  
5 request proper with the exception of their request for \$341 for unsuccessful efforts to  
6 serve persons who never became parties to this action. The court thus awards \$6,288.37  
7 in costs. The court also orders that the Defendants shall bear the costs jointly and  
8 severally. As noted above, WSSA dictates the use of state law in determining a plaintiff’s  
9 cost award by making costs a substantive element of recovery. As noted in the court’s  
10 previous order, WSSA also dictates that persons liable under the statute are “liable jointly  
11 and severally with and to the same extent as the seller or buyer . . . .” RCW  
12 § 21.20.430(3). WSSA thus mandates joint and several liability for costs.

13  
14 **B. The Court Awards Attorneys’ Fees of \$403,684.72.**

15 Plaintiffs seek just over \$504,000 in attorneys’ fees under WSSA. RCW  
16 § 21.20.430(1). The court must determine a reasonable attorneys’ fee award using the  
17 “lodestar” method. Bowers v. Transamerica Title Ins. Co., 675 P.2d 193, 202 (Wash.  
18 1987). The court must multiply the number of hours the Tumelsons’ counsel reasonably  
19 expended in pursuing their claims by a reasonable hourly rate. Id. at 201-202. The result  
20 of this calculation is the “lodestar,” which the court can in some cases adjust upward or  
21 downward to account for the contingent nature of the attorneys’ work or the quality of the  
22 attorneys’ work. Id. at 205. The party seeking fees bears the burden of proving the  
23 reasonableness of its fee request. Mahler v. Szucs, 957 P.2d 632, 650 (Wash. 1998). The  
24

---

25  
26 <sup>3</sup>Although it might have been possible for the Tumelsons to recover state costs for their  
27 WSSA claims and federal costs for other claims, the Tumelsons did not make such a request,  
28 presumably because they could not segregate their costs on a claim-by-claim basis. The court  
therefore applies only state law to the Tumelsons’ cost claim.

1 court has broad discretion in determining attorneys' fees, subject to review only for  
2 "manifest abuse." Boeing Co. v. Sierracin Corp., 738 P.2d 665, 682 (Wash. 1987).

3 Many of the factors relevant to the Tumelsons' attorneys' fees request are not in  
4 controversy. Defendant Slaughter does not allege that the hourly rates of the Tumelsons'  
5 counsel are unreasonable, and the court noted in its previous order that the rates are  
6 reasonable in light of prevailing rates in the Seattle legal market and the complexity of  
7 this matter. Neither the Tumelsons nor Defendant Slaughter seek an upward or  
8 downward adjustment of the lodestar based on the quality of counsel's work or the  
9 contingent nature of success in this action.

10 The only dispute is over the number of hours counsel "reasonably expended." The  
11 Tumelsons have submitted over 23 invoices totaling more than 150 pages documenting  
12 legal services dating back to their first meeting with counsel in April 2003. Counsel have  
13 submitted a narrative description of the invoices. The court appreciates counsel's effort,  
14 but notes that counsel focus heavily on proving the *number* of hours they expended, and  
15 have devoted much less attention to the question of whether they *reasonably expended*  
16 those hours. The court cannot award attorneys' fees for "hours spent on unsuccessful  
17 claims, duplicated effort, or otherwise unproductive time." Bowers, 675 P.2d at 203. In  
18 addition, the Tumelsons request fees for paralegal work, a request that requires additional  
19 proof. August 2, 2005 Order at 6 (citing Absher Const. Co. v. Kent Sch. Dist. No. 415,  
20 917 P.2d 1086, 1088 (Wash. Ct. App. 1995)). Under these legal standards, only in the  
21 rarest cases would counsel be entitled to claim that every hour spent pursuing a case was  
22 "reasonably expended." This is not a criticism of counsel in this case or of attorneys in  
23 general, but rather an acknowledgment that attorneys, like everyone else, are imperfect,  
24 and will inevitably make missteps in pursuing a case. Those missteps may be immaterial  
25 to their client's ultimate success, but they are material in determining the amount of  
26 recoverable attorneys' fees.

1 With these observations and the Tumelsons' burden of proof in mind, the court  
2 wades into the sheaf of paper describing the efforts of counsel in this case, beginning  
3 with their request for paralegal time. Despite counsel's statement that they have  
4 endeavored to remove "clerical" work that their paralegals performed from their fee  
5 request, they have not gone far enough. Their invoices still include numerous entries for  
6 unquestionably clerical work (e.g., preparing copies, finalizing copies, scanning  
7 documents, creating compact discs). Even more entries describe time that might  
8 constitute legal services, and might be clerical (e.g., preparing exhibits, working on  
9 exhibits, making phone calls, reviewing transcripts). Some describe work that is probably  
10 legal (legal research, drafting pleadings). For the substantial majority of the paralegal  
11 time, the Tumelsons do not prove that the time is recoverable under the standards set  
12 forth in Absher. The court must therefore make a substantial deduction for paralegal  
13 time. This is no easy task, as counsel's invoices include neither monthly nor cumulative  
14 totals that isolate the time that paralegals spent in this case. Based on the court's review  
15 of the invoices, its estimate of the ratio of paralegal work to attorney work, its estimate of  
16 the ratio of reasonably expended paralegal time to time that is arguably clerical, and the  
17 lower billing rates that apply to paralegal time, the court deducts 10% from the  
18 Tumelsons' fee request.

19  
20 Turning to time that attorneys expended, the court begins with deductions for time  
21 spent pursuing unsuccessful claims. The Tumelsons have deducted more than \$30,000  
22 from their invoices to account for unsuccessful claims, including claims against  
23 defendants or potential defendants who were never brought to trial. The court finds these  
24 deductions reasonable and declines to impose further deductions for unsuccessful claims.

25 As to duplicative effort, the court notes that senior attorneys spent a substantial  
26 amount of time in this case supervising and reviewing the efforts of junior attorneys.  
27 This is to be expected and encouraged. However, the court must determine how much of  
28

1 the supervision and review was reasonable under the circumstances. The court's estimate  
2 of the ratio of hours that junior attorneys spent to the hours senior attorneys spent  
3 reviewing or supervising their work leads it to impose a 5% reduction in the Tumelsons'  
4 fee request to account for duplicative effort.

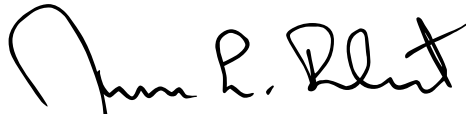
5 Finally, the court must determine if, after accounting for the deductions it has  
6 already taken, all of the time that attorneys spent was productive. The court has no way  
7 of doing so. Counsel offer little assistance in this endeavor, and their invoices do not  
8 speak for themselves. As noted above, however, it would be the rare case where every  
9 minute of attorney time was invested in productive effort. Based on its review of the  
10 invoices, the court deducts an additional 5% from the Tumelsons' fee request to account  
11 for unproductive time.

12 The Tumelsons request \$504,605.90 in attorneys' fees, a request that takes into  
13 account the \$30,000 deduction that the court noted above. The deductions the court  
14 imposed above total 20% of this fee request, reducing the award to \$403,684.72. The  
15 court has considered Defendant Slaughter's objections to specific hours as unreasonable  
16 (Slaughter Opp'n at 7-8), and has taken those objections into account in calculating the  
17 above reductions.

#### 18 IV. CONCLUSION

19 For the foregoing reasons, the court GRANTS the Tumelsons' motion (Dkt.  
20 # 307) and awards costs of \$6,288.37 and attorneys' fees of \$403,684.37.

21 DATED this 20th day of September, 2005.

22  
23  
24 

25 JAMES L. ROBART  
26 United States District Judge  
27  
28